Supreme Court, U.S.
F I L E D
DEC 20 1995
OFFICE OF THE CLERK

No. 95-795

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

RALPH G. NASATKA,
Petitioner,
v.
DELTA SCIENTIFIC CORPORATION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

* WILLIAM J. ROBINSON
MITCHELL P. BROOK
GRAHMAN & JAMES
801 South Figueroa Street
Suite 1400
Los Angeles, CA 90071
(213) 624-2500
Attorneys for Respondent Delta Scientific Corporation
* *Counsel of Record*

Bowne of Los Angeles, Inc., Law Printers (213) 627-2200

30 P

QUESTIONS PRESENTED

Nasatka's "Questions Presented" are unrelated to any issue in this lawsuit.

Question 1 urges that the Federal Circuit improperly sanctioned counsel for a frivolous appeal. This misconstrues the posture of this case in which the issue was the propriety of a dismissal without prejudice of a portion of the complaint. The District Court correctly dismissed the complaint, applying the standards of Rule 11, Fed.R.Civ.P. Despite admonitions from both the District Court and the Federal Circuit to simply re-file the complaint, petitioner elected to pursue the meritless appeal. There can be no prejudice to petitioner in simply re-filing the complaint after a dismissal without prejudice.

Question 2 presents an irrelevant proposition. As counsel has been sanctioned, not the petitioner, the award of appellee's fees as to counsel is irrelevant to this action. In any event, there is no issue as to propriety of including the fees associated with an accounting in an award of attorney fees.

The only issue on this petition for certiorari is whether respondent should be awarded its fees and costs in responding to the frivolous petition for certiorari.

STATEMENT PURSUANT TO COURT RULE 29.6

Pursuant to Court Rule 29.6, respondent Delta Scientific Corporation states that it is a corporation of the State of California. It has no parent company and no subsidiaries that are not wholly owned.

TABLE OF CONTENTS

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 3

A. The Orders Appealed 3

B. The Warnings To Nasatka Against Proceeding 4

REASONS FOR DENYING THE WRIT AND SUMMARY OF ARGUMENT 6

ARGUMENT 7

A. Nasatka's Argument Is Not Tied To The Facts 7

B. The Court Below Correctly Applied Rule 38 In Finding The Appeal Frivolous And Awarding Sanctions Against Nasatka's Attorney 8

C. There Is No Constitutional Issue As Nasatka Was Not Denied A Forum For His Alleged Grievance 15

D. There Is No Proper Issue Raised As To The Holding That The Appeal Was Moot 16

E. The Amount Of Sanctions Are At The Discretion Of The Court 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Bakker v. Grutman,
942 F.2d 236 (4th Cir. 1991) 9

Bartenders & Culinary Wkrs. v. Howard Johnson Co.,
535 F.2d 1160 (9th Cir. 1976) 17

Braley v. Campbell,
832 F.2d 1504 (10th Cir. 1987) 9, 12

Buck v. U.S.,
967 F.2d 1060 (5th Cir. 1992),
cert. denied 113 S. Ct. 1052 (1993) 9

Burlington Northern R. Co. v. Woods,
480 U.S. 1, 107 S.Ct. 967 (1987) 11, 12

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384, 110 S.Ct. 2447 (1990) 9, 11, 19

Garden State Broadcasting Ltd. Partnership v. FCC,
996 F.2d 386 (D.C. Cir. 1993) 8

Gattuso v. Pecorella,
733 F.2d 709 (9th Cir. 1984) 9, 12

Hill v. Norfolk and Western Ry. Co.,
814 F.2d 1192 (7th Cir. 1987) 14

Mareno v. Rowe,
910 F.2d 1043 (2nd Cir. 1990),
cert. denied 498 U.S. 1028 (1991) 13

Mars Steel Corp. v. Continental Bank N.A.,
880 F.2d 928 (7th Cir. 1989) 14

Matter of Generes,
69 F.3d 821 (7th Cir. 1995) 8, 14

McKnight v. General Motors Corporation,
___ U.S. ___, 114 S.Ct. 1826 (1994) 11

Nagle v. Alspach,
8 F.3d 141 (3d Cir. 1993),
cert. denied 114 S. Ct. 1337 (1994) 8

Peerless Indus. Paint Coatings v. Canam Steel,
979 F.2d 685 (8th Cir. 1992) 9

Pelletier v. Zweifel,
921 F.2d 1465 (11th Cir. 1991),
cert. denied 502 U.S. 855 (1991) 9

Pennsylvania v. Del. Valley Citizens' Council,
478 U.S. 546, 106 S.Ct. 3088 (1986),
judgment rev'd on other grounds, 483 U.S. 711,
107 S.Ct. 3078 (1987) 18

Roadway Express, Inc. v. Piper,
447 U.S. 752, 100 S.Ct. 2455 (1980) 14

Resolution Trust Corp. v. Gold,
30 F.3d 251 (1st Cir. 1994) 8

Romala Corp. v. U.S.,
927 F.2d 1219 (Fed. Cir. 1991) 13

Ross v. City of Waukegan,
5 F.3d 1084 (7th Cir. 1993) 14

Simmons v. Allstate Life Ins. Co.,
65 F.3d 526 (6th Cir. 1995) 8, 12

Schiff v. Simon & Schuster, Inc.,
766 F.2d 61 (2d Cir. 1985) 9

WSM, Inc. v. Tennessee Sales Co.,
709 F.2d 1084 (6th Cir. 1983) 12

STATUTES

28 U.S.C. § 1498 3

28 U.S.C. § 2077 10

28 U.S.C. § 1927 14

Rule 11, Fed.R.Civ.P. 1, 3, 4, 9, 11, 13

Rule 38, Fed.R.App.P. 1, 7, 8, 9, 11, 12, 13, 18

U.S. Sup. Ct. Rule 15.1(j)(i) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RALPH G. NASATKA,

Petitioner,

v.

DELTA SCIENTIFIC CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION

The position petitioner Ralph G. Nasatka ("Nasatka") asserts in this case through counsel would divest the courts of appeals of authority to award sanctions for frivolous appeals pursuant to Rule 38, Fed.R.App.P. If this position were tenable at all, it would have been pointless for this Court to have proscribed Rule 38 in the first place. Nasatka's baseless assertion that the Federal Circuit improperly exercised its discretion under Rule 38 would eviscerate the rule and open the floodgates of frivolous appeals.

Oddly, Nasatka did not include the District Court orders appealed from in the appendix of the Petition. That technical defect highlights the frivolity of the instant petition -- in addition to rendering Nasatka's petition improper under Court Rule 15.1(j)(i).[1]

In reality, this case pertains to an appeal of a dismissal *without prejudice*. Both the District Court and the Court of Appeals admonished Nasatka to simply re-file the complaint. Instead, Nasatka and his counsel pursued a strategy of litigating to the bitter end -- merits to the wind. First a motion for reconsideration was denied by the District Court. Then, rather than simply re-filing the complaint, Nasatka pursued the appeal. The appeal incurred costs for both parties, *for no reason at all*. Given that the dismissal appealed and subject to the instant petition was without prejudice, there was no possibility of any prejudice to Nasatka. Nasatka's and his counsel's claim to the contrary in the instant petition is itself frivolous and deserving sanctions.

Nasatka had full knowledge that the option of re-filing the complaint was available -- having been so advised by both the District Court and Court of Appeals. The Court of Appeals decision properly rests on the application of the Rules proscribed by this Court to the facts found in the case. The fairness to Nasatka of the prior proceedings, together with the gross injustice to respondent Delta Scientific Corporation ("Delta"), the waste of judicial resources and the flood of frivolous appellate practice that would result if the dismissal was reversed, militate against granting certiorari here.

---

[1] Respondent hereby moves to strike Nasatka's Petition because of this defect.

STATEMENT OF THE CASE

The District Court sanctioned Nasatka pursuant to Rule 11, Fed.R.Civ.P., for filing a complaint based on an inadequate pre-filing investigation. The pertinent sanction was the dismissal without prejudice of a portion of the complaint.

By way of a brief factual background, this action concerns security barriers installed in roadbeds. The barriers generally include a hydraulically-activated steel plate that is movable between positions flush with the roadway and 45° to the roadway. Nasatka sued Delta for patent infringement. Two classes of customers were at issue: the U.S. government, for barriers inserted at the Pentagon (the "government sales"); and the New York/New Jersey Port Authority, for barriers installed at the World Trade Center (the "third-party sales"). Nasatka's complaint alleged that he owns Patent No. 4,619,395 (the "'395 patent") and that this patent was infringed by Delta.

A. The Orders Appealed

This action was dismissed by the District Court by Orders dated February 4 and February 14, 1994. Nasatka's claims of patent infringement by Delta were dismissed with prejudice in part and without prejudice in part. The February 14 Order (which modified the February 4 Order) had three parts:

> (1) Nasatka's Complaint was dismissed *with prejudice* with respect to claims of patent infringement regarding products sold by Delta to the United States government for lack of subject matter jurisdiction of the District Court in view of 28 U.S.C. § 1498;

(2) Nasatka's Complaint was dismissed *without prejudice* with respect to Delta's allegedly infringing third-party sales for failure to do a pre-filing investigation pursuant to Rule 11, Fed. R. Civ. P.; and

(3) Delta's motion for monetary sanctions was taken under advisement.

Nasatka appealed from both the February 4 and 14 Orders as well as from an Order dated May 6, 1994 (entered May 9) denying Nasatka's Motion For Reconsideration. The third part of the February 14 Order ultimately was decided in Nasatka's favor on July 5, 1994.

Nasatka did not appeal the first part of the February 14th order--the part dismissed with prejudiced. Accordingly, the *only* portion of the Orders remaining for review is the dismissal without prejudice of the infringement claim with respect to Delta's third-party (non-governmental) sales for failure to do a Rule 11 pre-filing investigation.

B. The Warnings To Nasatka Against Proceeding

With respect to this dismissal without prejudice, the District Court properly advised Nasatka that:

> "There really isn't any prejudice to the plaintiff; he can refile it [the complaint]. As far as any delay in this case, we're noted for giving speedy trials. I don't think the delay would be untoward towards the plaintiff.

> "Accordingly, I will deny the motion to reconsider."[2]

See also Court of Appeals Opinion, A9 ("The district court had observed in its May 6, 1994 decision denying reconsideration that Nasatka suffered no prejudice because he could refile his complaint").

Nasatka received the same admonition by the Court of Appeals in its decision on Delta's Motion to dismiss the appeal (A19-26). That decision came *before* the appeal briefs were filed. Thus, at that time, the Court of Appeals (and Delta) did not know that Nasatka was only appealing the portion of the judgment that was made without prejudice. In the opinion on that motion, Judge Plager warned Nasatka that if only the without prejudice portion was being appealed, Nasatka should just re-file the case (A9; A21n):2

> "In the event that Nasatka is seeking review of only this portion of the judgment [dismissal without prejudice], it is unclear why Nasatka does not refile his complaint and voluntarily dismiss this appeal."

After Nasatka's appeal brief was filed, it was clear that in fact Nasatka only appealed the dismissal without prejudice. Accordingly, given that the judgment appealed was without prejudice, by definition, there was no prejudice to Nasatka. Given the lack of merit of that appeal, Judge Plager invited the panel to overrule his prior decision not to dismiss. At the oral argument, Judge Plager withdrew his prior belief (on the motion to dismiss) that there would be prejudice to Nasatka in dismissing the appeal:

---

[2] Pages 13-14 of the hearing transcript on the motion for reconsideration, May 6, 1994.

> "I issued an Order at that time [referring to the ruling on the motion to dismiss] in which I said there was a sufficient showing of prejudice on its face, but I think the panel is free to overturn my order in that respect, and *I would support the panel in overturning it.*" (quoting pp. 18 and 4 of Nasatka's Petition) (emphasis added)

Without shame, Nasatka now relies on Judge Plager's invitation to the panel to overturn his denial of Delta's Motion to Dismiss as support for the proposition that Nasatka would have been prejudiced by not appealing. That is a ludicrous spin on Judge Plager's admonitions. It was clear that the portion of the judgment made with prejudice was not in issue. This is yet another example of the type of conduct which was sanctioned below. The Court of Appeals was correct in holding that, "By making clear Nasatka's proper course, these warnings accentuate the frivolity of Nasatka's persistence in this appeal." (A9)

REASONS FOR DENYING THE WRIT AND SUMMARY OF ARGUMENT

Nothing in this case warrants review on certiorari. There are no special or important reasons why this Court should give petitioner another hearing on matters already considered and correctly decided below. The comprehensive Court of Appeals opinion dealt with and rejected essentially the same arguments regarding the merits of Nasatka's tactics.

Both the District Court and the Court of Appeals repeatedly warned Nasatka to simply re-file the action. Ignoring those admonitions Nasatka and his counsel pressed ahead -- crowding the Courts' dockets and entangling Delta

in a needless appellate process. No constitutional issue is involved.

The decision below correctly applied Rule 38 Fed.R.App.P. It correctly ruled that Rule 38 is meant to compensate the prevailing party for having to defend against a meritless appeal and to deter such frivolity. This is entirely consistent with other circuits and the Advisory Committee Note.

Nasatka's arguments in the Petition are based on an unwarranted disregard of the findings and admonitions below and upon incorrect assertions pertaining to inapposite authority.

ARGUMENT

A. Nasatka's Argument Is Not Tied To The Facts

Nasatka resorts to a shotgun argument which resorts to fatuous interpretations of precedent, completely unconnected to this action. Indeed, Nasatka states no compelling reason why this case merits review, instead relying on a very difficult to discern conflict among the circuits based on strained interpretations of circuit court opinions. Moreover, Nasatka fails to tie to this case the alleged conflict between the Federal Circuit and other circuits to the facts of this case. Indeed, Nasatka fails to point to where, if any, the alleged deficiencies in Federal Circuit precedent have occurred in the opinion below, and indeed they do not. In addition, there is no conflict between the Federal Circuit and the other circuits on the issues raised by Nasatka. The various circuits have uniformly sanctioned frivolous appeals as has the Federal Circuit.

B. The Court Below Correctly Applied Rule 38 In Finding The Appeal Frivolous And Awarding Sanctions Against Nasatka's Attorney

The Federal Circuit in the Opinion below emphasized the singularly atypical posture of this case and the extreme frivolity of Nasatka's tactics. First, the Court deemed the appeal frivolous (A8). Then, it went on to explain aggravating circumstances, namely the repeated admonitions that Nasatka simply re-file the complaint (A9). The Court below correctly held that (A9),

> "By making clear Nasatka's proper course, these warnings accentuate the frivolity of Nasatka's persistence in this appeal."

Moreover, the Court below correctly directed the sanctions to be paid by counsel, not the petitioner (A10): "Counsel, not client, must pay damages here because the pursuit of the appeal served to protect counsel more than client."

The Court below correctly applied the standards of Rule 38, Fed.R.App.P. The Court first found that the appeal was frivolous (A7-A8). The Court then used its discretion in awarding sanctions (A9-10). In this regard, the Court noted the aggravating circumstance of Nasatka's having repeatedly been advised to re-file the complaint (A9).

This approach is consistent with the approach uniformly taken in each of the regional circuits in awarding sanctions for frivolous appeals. *Matter of Generes*, 69 F.3d 821, 828 (7th Cir. 1995); *Simmons v. Allstate Life Ins. Co.*, 65 F.3d 526, 531 (6th Cir. 1995); *Resolution Trust Corp. v. Gold*, 30 F.3d 251, 254 (1st Cir. 1994); *Nagle v. Alspach*, 8 F.3d 141, 145 (3d Cir. 1993); *Garden State Broadcasting Ltd. Partnership v. FCC*, 996 F.2d 386, 396 (D.C.Cir.

1993); *Peerless Indus. Paint Coatings v. Canam Steel*, 979 F.2d 685, 687 (8th Cir. 1992); *Buck v. U.S.*, 967 F.2d 1060, 1062 (5th Cir. 1992), *cert. denied* 113 S.Ct. 1052 (1993); *Bakker v. Grutman*, 942 F.2d 236, 242 (4th Cir. 1991); *Pelletier v. Zweifel*, 921 F.2d 1465, 1523 (11th Cir. 1991), *cert. denied* 502 U.S. 855 (1991); *Braley v. Campbell*, 832 F.2d 1504, 1512 (10th Cir. 1987); *Schiff v. Simon & Schuster, Inc.*, 766 F.2d 61 (2d Cir. 1985); *Gattuso v. Pecorella*, 733 F.2d 709, 710 (9th Cir. 1984).

The approach taken below is also consistent with the Advisory Committee Note to Rule 38, which states: "damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant."

This Court also has envisioned that frequently Rule 38 sanctions will follow the award of sanctions under Rule 11, Fed.R.Civ.P.:

> "If the appeal of a Rule 11 sanction is itself frivolous, Rule 38 gives appellate courts ample authority to award expenses. Indeed, because the district court has broad discretion to impose Rule 11 sanctions, appeals of such sanctions may frequently be frivolous."

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 407, 110 S.Ct. 2447, 2462 (1990).

The Federal Circuit's decision in this case was entirely consistent with this holding. The pertinent portion of Nasatka's complaint was dismissed without prejudice as a sanction for failing to perform an adequate pre-filing investigation. Nasatka and counsel continued their

sanctionable conduct on the appeal and were properly sanctioned for it.

Nasatka improperly argues that the Federal Circuit *Practice Note* to Rule 38 is inconsistent with the rule itself. It is unclear how this is connected to the present case. Moreover, this argument belies the fact that the regional circuits have authority to promulgate local rules supplementing the Federal Rules. 28 U.S.C. § 2077. Indeed, the Federal Circuit would be entitled to implement its own version of a sanctions rule, should it so desire, but has not done so.

Faced with a flood of frivolous appeals and strike suits, the Courts are increasingly awarding sanctions for frivolous appeals. This is a sound policy and is not subject to controversy. There also is no constitutional issue implicated in this case. Nasatka has had complete access to the courts. The appealed complaint was without prejudice. Nasatka was free to re-file in the District Court.

Nasatka misconstrues the Practice Note as meaning that sanctions are automatically awarded. In fact, there is no indication of that. Indeed, the full text of the Practice Note makes clear that the Federal Circuit was "warning" *attorneys* against pursuing frivolous appeals. In the present case, Nasatka and his attorney received additional warnings as well, none of which were heeded.

Moreover, Nasatka does not show that the Federal Circuit abused its discretion in this case. Clearly it did not. Instead, Nasatka relies on other opinions of the Federal Circuit, all of which are over four years old (petition, p. 8) and none of which are related to this case. All that those cases show is that sanctions were awarded for frivolity. They do not evince any inconsistency or conflict among the

circuits. They also have no connection whatsoever to this case and cannot be used to prove that somehow too much vigor (or too little vigor) was applied in sanctioning Nasatka's conduct.[3]

Nasatka also argues that "guidance is needed on Rule 38." Yet his reasons for requesting that guidance are so obtuse and without merit that it is difficult to believe that they could have been presented in good faith. There is no uncertainty in the applicable standards and as discussed

---

[3] The cases relied upon by Nasatka for his argument that the Federal Circuit is too vigorous are inapposite. *McKnight v. General Motors Corporation*, ___ U.S. ___, 114 S.Ct. 1826 (1994) was remanded for a finding as to whether the sole basis for sanctions was the interpretation of a statutory provision. There was no such legal issue in this appeal. Moreover, the *McKnight* opinion makes clear that the *only potential for redress was the appeal. Id.* Here the precise opposite is true; Nasatka was able to -- and was indeed repeatedly admonished to -- pursue redress by re-filing the complaint in the District Court.

Nasatka's further reliance on this Court's holding in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 407-408, 110 S.Ct. 2447, 2462 (1990) also is unavailing. That case decided that sanctions under Rule 38, Fed.R.App.P., should not follow automatically from an unsuccessful appeal of sanctions under Rule 11, Fed.R.Civ.P., but recognized that often they would. Here, the Rule 38 sanctions were completely independent of the Rule 11 sanctions. Indeed, Nasatka's and counsel's conduct on appeal provided the independent bases for the award of Rule 38 sanctions. This award was entirely consistent with the standards set forth in *Cooter & Gell*.

Burlington Northern R. Co. v. Woods, 480 U.S. 1, 107 S.Ct. 967 (1987) also is inapposite. That case involved a mandatory state sanction provision. It did not involve frivolous appeals. Rather, the provision required the award of a sanction amounting to ten percent of a monetary judgment where an appeal was unsuccessful. Here, there was no automatic sanction imposed for an unsuccessful appeal. Instead, the conduct of the appeal and its frivolous nature resulted in sanctions.

above, and the regional circuits have acted uniformly in sanctioning frivolous appeals. Indeed, Nasatka acknowledges that this Court already "has addressed" Rule 38 in *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 107 S.Ct. 967 (1987).

Apparently the primary reason why Nasatka argues that "guidance is needed" is that "Appellate sanctions have apparently become more prevalent" and on that basis "Nasatka submits that these issues are ripe for consideration by this Court." In reality there is nothing new about circuit courts recognizing the increasing prevalence of frivolous appeals and the use of Rule 38 as a deterrent. *E.g.*, *Simmons*, 65 F.3d at 531 ("'With courts struggling to remain afloat in a constantly rising sea of litigation, a frivolous appeal can itself be a form of obscenity. Rule 38 should doubtless be more often enforced than ignored. . . .'", *quoting WSM, Inc. v. Tennessee Sales Co.*, 709 F.2d 1084, 1088 (6th Cir. 1983)); *Gattuso*, 733 F.2d at 710 ("'Meritless appeals of this nature are becoming increasingly burdensome on the federal court system'"). The mere increase in frivolous litigation provides no basis for concluding that review is warranted or necessary. There is no dispute among the circuits and the pertinent portions of Rule 38 have existed since 1967.

Nasatka urges that the Federal Circuit approach in *other* cases is inconsistent with that of the Second, Seventh and Tenth Circuits in that it does not require proof of bad faith by the sanctioned party. Yet in reality the precedents of those circuits are consistent with the award of sanctions in this case. Moreover, in this case, the opinion below recited numerous instances of bad faith. Not even Nasatka argues that there is no such evidence in this case. Rather, Nasatka argues hypothetically -- that in another case the Federal Circuit did not require such evidence.

As proof of the Federal Circuit's approach, Nasatka relies on *Romala Corp. v. U.S.*, 927 F.2d 1219, 1226 (Fed. Cir. 1991). However, Nasatka fails to tie that decision to the present case, as he cannot. The Court below did not rely upon *Romala*. As here, the Court in *Romala* sanctioned vexatious litigation tactics. The Federal Circuit held that the standard governing Rule 38 can be determined based upon the objective, vexatious conduct of a litigant. *Id.* at 1226. The Federal Circuit held that vexatious tactics were evident from the conduct of the litigant and that state of mind was not pertinent where the issue was vexatiousness:

> "[T]he subjective intent of Romala and its attorneys in making irrelevant arguments and grossly inaccurate statements is immaterial. ... The controlling consideration ... is the consistently inaccurate and irrelevant character of Romala's assertions of fact, which is clear on the face of the briefs and for which no exonerating explanation is possible."

Id.

This objective standard of vexatiousness is consistent with that applied in other circuits as well. Indeed, authority cited by Nasatka is inapposite. For example, *Mareno v. Rowe*, 910 F.2d 1043, 1047 (2nd Cir. 1990), *cert. denied* 498 U.S. 1028, 111 S. Ct. 681 (1991) was decided under Rule 11, Fed.R.Civ.P., not Rule 38. There, the Second Circuit held that vexatious tactics alone may merit an award under Rule 11, although in that case vexatiousness had not been proven.

Braley v. Campbell, 832 F.2d 1504, 1512 (10th Cir. 1987), contradicts Nasatka stating:

> "Alexander argues that sanctions under either Rule 38 or § 1927 should be imposable against an attorney personally only for subjective bad faith. We disagree. That standard is virtually impossible to apply. Even under the courts' inherent powers, the Supreme Court has only required conduct that 'constituted or was *tantamount* to bad faith' *Roadway*, 447 U.S. at 767, 100 S.Ct. at 2465 (emphasis added)."

The Seventh Circuit also has not required a showing of bad faith in cases of vexatious conduct. For example, in *Matter of Generes*, 69 F.3d at 828, the Seventh Circuit applied an objective standard, in holding that, "An appeal is frivolous when 'the result is foreordained by the lack of substance to the appellant's arguments'" (*citing Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 938 (7th Cir. 1989) (*en banc*)). Nasatka's reliance upon *Ross v. City of Waukegan*, 5 F.3d 1084, 1090 (7th Cir. 1993) is ill founded. In *Ross*, there was a substantive issue in the argument. The consistency of the Seventh Circuit with the Federal Circuit is confirmed in *Hill v. Norfolk and Western Ry. Co.*, 814 F.2d 1192, 1202 (7th Cir. 1987), which held that "objectively groundless legal arguments" alone can serve as the basis of a Rule 38 sanction. There, the court assumed the arguments were made "in perfect good faith").

Regardless of whether there is a requirement of evidence of bad faith, the opinion below is replete with recitation of such evidence. For example, Nasatka pursued an appeal even after it was likely rendered moot (A5-A8), pursued an appeal without prejudice despite numerous warnings (A9-A10), and made meritless arguments on appeal (A11).

Moreover, Nasatka's bad faith is readily apparent on the face of his appeal brief. It is clear from his argument

therein that he knew full well that the appeal had been mooted, but he pursued the appeal anyway. The cornerstone of his argument in his appeal brief was that new fact findings by the District Court in a later motion undermined the findings forming the basis of the dismissal without prejudice:

> "The district court ultimately recognized and found 'that Nasatka did conduct an adequate pre-filing investigation of the WTC barriers.' ... Considering that the dismissal was premised upon what was originally considered to be other than a reasonable pre-filing investigation, this most recent order establishes, without more, that the dismissal as to the World Trade Center barriers was in error."

Nasatka Appeal Brief at 22. As advised repeatedly, Nasatka should have quit the appeal and simply returned to the District Court.

C. There Is No Constitutional Issue As Nasatka Was Not Denied A Forum For His Alleged Grievance

Nasatka is blatantly disingenuous in arguing that "sanctions have been imposed even though the Federal Circuit earlier acknowledged that Nasatka 'would be denied effective review' if he did not proceed with the appeal." (petition p. 9). In fact, there was no such ruling by the Federal Circuit as to the issues at hand. Judge Plager's opinion on Delta's Motion to Dismiss was *before Nasatka withdrew the "with prejudice" portion of the judgment from the appeal.* Judge Plager made clear to Nasatka that he should not appeal, "In the event that Nasatka is seeking review of only" the dismissal without prejudice (A9, A21n). When it became apparent after briefing that Nasatka was only appealing the dismissal without prejudice, Judge Plager made clear that the bases of his prior

opinion denying dismissal did not exist (A9; Petition, pp. 4, 18). Indeed, Judge Plager invited the panel to overturn his prior ruling (Petition, pp. 4, 18).

Thus, the passage upon which Nasatka's Petition hinges does not say what he says it does. For this reason, Respondent respectfully requests that this Court exercise its discretion under Court Rule 42.2 and 43 and award damages and costs.

D. There Is No Proper Issue Raised As To The Holding That The Appeal Was Moot.

Nasatka does not allege disagreement among the circuits or constitutional issue with respect to the holding that the appeal was moot.

First Nasatka makes an irrelevant argument in arguing that Delta's attorney fee motion rendered the appeal case not moot. Moreover, he has not even alleged disagreement among the circuits or improper application of the law. The Court of Appeals correctly held that:

> "Delta's motion for attorney fees in the district court and the arguments Delta may make in that motion are irrelevant to whether this appeal seeking reversal of the order dismissing Nasatka's original complaint became moot before being submitted for decision here. ... If the district court grants that [attorney fees] motion, Nasatka's recourse is to appeal that order."

(A6-A7).[4] Nasatka's argument that without reversal of the dismissal without prejudice he might be liable for attorney fees makes no sense. In fact, the Motion for attorney fees was denied. If the action was mooted, he simply could have re-filed his complaint and, if it was an issue as to attorney fees, could have moved to vacate the original judgment as to the dismissal in part. However pursuing an appeal simply increased the expenses of the parties and imposed an utterly unnecessary duty on the Court. Even if the appeal was successful, Nasatka still would have been liable for attorney fees because he filed a complaint knowing it was improper -- with regard to the government sales allegations, which were dismissed with prejudice.

Second, Nasatka makes an obscure procedural argument. He seems to argue that an improper procedure was followed in making the finding of mootness. Apparently Nasatka is arguing that because Delta did not raise the issue of mootness, the Court of Appeals could not make the finding. Yet in reality Nasatka himself argued that the appeal was moot, without actually using that term in his appeal brief, as quoted above. Based on this argument, Nasatka knew full well that the appeal was moot, as the Court of Appeals concluded. Accordingly, the sanctions were warranted.

---

[4] Nasatka's reliance on *Bartenders & Culinary Wkrs. v. Howard Johnson Co.*, 535 F.2d 1160 (9th Cir. 1976) is unfounded. That case had nothing to do with a pending motion for attorney fees, or with a moot appeal. Indeed, the underlying controversy remained active in that the question was whether a court may impose substantive terms of a collective bargaining agreement upon a successor employer. *Id.* at 1161-62.

E. The Amount Of Sanctions Are At The Discretion Of The Court

The amount of a damage award under Rule 38 is at the discretion of the appellate court. The 1967 Advisory Committee Note to Rule 38 states that "damages are awarded by the court in its discretion in the case of a frivolous appeal as a matter of justice to the appellee and as a penalty against the appellant." The Federal Circuit properly exercised its discretion in awarding Delta's attorney fees.

The Federal Circuit awarded Delta "its costs and reasonable attorney fees for this appeal ... as just damages." (A10). Delta then submitted its accounting. The Federal Circuit ultimately awarded Delta 72.1% of its fees and expenses. This amounted to a reduction of approximately $16,045 from Delta's total fees and expenses of 59,993.35 (*see* A16).

Oddly, the only issue as to fees raised by Nasatka is whether the fees associated with the accounting should be included. However, the total amount of those fees was only approximately $4,500.[5] That is *less than* the amount that the award was reduced from Delta's original request. Moreover, as the court below pro-rated the award, only approximately $3,250 of the total award is attributable to the fees associated with the accounting.

This award by the Federal Circuit is consistent with this Court's precedent. In *Pennsylvania v. Del. Valley Citizens' Council*, 478 U.S. 546, 555 n.3, 561, 568, 106

---

[5] Subsequent to the original award, Delta requested a supplemental award for fees associated with completing the initial application for attorneys' fees. That request covered fees which could not be included in the original request. That request was denied.

S.Ct. 3088, 3093 n.3, 3096, 3100 (1986), *judgment rev'd on other grounds, 483 U.S. 711, 107 S.Ct. 3078 (1987),* this Court affirmed an award of attorney fees which included $3,380 for the preparation of the fee application.[6]

The fees awarded were eminently reasonable and Nasatka presents no credible argument that they were not. Nasatka recognizes that the court held the rates charged to be reasonable, and the determination of reasonableness is patently clear on the face of the opinion. For Nasatka to now claim that the Federal Circuit did not make a finding of reasonableness of this award is blatantly disingenuous. Moreover, Nasatka's attempt to fabricate a "split in the circuits" is outrageous. There is no split in the circuits, even among the cases Nasatka cites (petition pp. 20-21). This argument is so far off the mark, it does not merit further discussion.

Delta believes that this argument is not made in good faith and calls for imposition of an additional sanction.

---

[6] Nasatka's reliance on *Cooter & Gell*, 496 U.S. at 406, 110 S.Ct. at 2461, is unavailing. That opinion did not address the issue at hand.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

* WILLIAM J. ROBINSON
MITCHELL P. BROOK
GRAHAM & JAMES
801 South Figueroa St.
Suite 1400
Los Angeles, CA 90071
(213) 624-2500

Attorneys for Respondent
Delta Scientific Corporation
* Counsel of Record

December 20, 1995

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles. I am over the age of 18 years and not a party to the within action; my business address is 633 W. 5th Street, Suite 1400, Los Angeles, California 90071.

On December 20, 1991, I served the within Respondent's Brief in Opposition to Petition In Re: "Ralph G. Nasatka v. Delta Scientific Corp." in the United States Supreme Court, October Term, 1995, No. 95-795, on all parties interested in said action, by placing three true copies thereof enclosed in a sealed envelope, with postage fully prepaid, in the United States Post Office mailbox at Los Angeles, California, addressed as follows:

Joseph W. Berenato, III, Esq.
MEYERS, LINIAK & BERENATO
6550 Rock Spring Drive
Bethesda, Maryland 20817

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 20, 1995, at Los Angeles, California.

Ce Ce Medina

CE CE MEDINA